FILED
OCT 20 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 748

DOMINICK ANGEL BRETTI,

Petitioner,

-v-

THE STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

MILTON E. GRUBMARK
Attorney for Petitioner
407 Lincoln Road
Miami Beach, Florida

INDEX TO PETITION

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2-3
CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED	2-5
STATEMENT OF THE CASE	5
HOW THE FEDERAL QUESTIONS WERE RAISED AND PASSED UPON IN STATE COURTS	9
REASONS FOR GRANTING THE WRIT	10
CONCLUSION	23
APPENDIX	App. 1

AUTHORITIES CITED

	Page
Agnello v. United States, 269 U.S. 20 (1925)	11
Barnes v. State, 25 Wis.2d 116, 130 N.W. 2d (1964)	15
Beck v. Ohio, 379 U.S. 89 (1964)	11
Boyd v. United States, 116 U.S. 616 (1886)	10
DeLuna v. United States, 324 F2d 375 (CA 5th 1963)	23
Getchell v. United States, 282 F.2d 681 (1960)	24
Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931)	12
Griffin v. California, 380 U.S. 609, 615 (1965)	18
Hayes v. United States, 329 F.2d 209, 222 (CA 8th Cir. 1964)	18
Judd v. United States, 190 F2d 649 (C.A.D.C. 1951)	13
Ker v. California, 374 U.S. 23 (1963)	10
Krulewitch v. United States, 336 U.S. 440 (1949)	23
Mapp v. Ohio, 367 U.S. 643 (1961)	10
Miranda v. Arizona, 16 L.Ed 2d 692 (1966)	13, 15
Preston v. United States, 376 U.S. 364 (1964)	11
Schaffer v. United States, 221 F.2d 17 (1955)	22

AUTHORITIES CITED (cont.)

	Page
Shepard v. Maxwell, 384 U.S. 333 (1966)	19
Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)	11
Singleton v. State, 183 So. 2d 245 (1966)	18
United States v. Accardo, 298 F. 2d 133 (1962)	20
United States v. Haupt, 136 F. 2d 661 (1943)	22
Warden, Maryland Penitentiary v. Hayden, 87 S. Ct. 1642 (1967)	12
Weed v. United States, 340 F. 2d 827 (1965)	15

OTHER AUTHORITIES CITED

Constitution of the United States, Amendment IV	3
Constitution of the United States, Amendment V	4
Constitution of the United States, Amendment XIV	4
Rules of the Supreme Court, Rule 19	5
Title 28 U.S.C. Section 1257 (3)	4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. _____

DOMINICK ANGEL BRETTI,

Petitioner,

-v-

THE STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari issue to review the Order of the District Court of Appeal, Third District of the State of Florida filed November 15, 1966.

OPINIONS BELOW

The Judgment of the Criminal Court of Record in and for Dade County, Florida was filed and entered on November 6, 1966. It is reported at Criminal Court of Record, Minute Book No. 187 on Page 384.

The Opinion of the District Court of Appeal, Third District was filed November 15, 1966. Rehearing was denied December 5, 1966. (Appendix A). It is reported at 192 So. 2d 6 (Fla. App. 1966).

The decision of the Supreme Court of Florida was filed on April 27, 1967. Petition for Rehearing was denied on May 24, 1967. (Appendix B). It is reported at 201 So. 2d 459 (Fla. 1967).

JURISDICTION

The Order of the Supreme Court of the State of Florida denying Certiorari was entered on May 24, 1967, upon a denial of a timely Petition for Rehearing. Mr. Justice Fortas extended the time for filing Petition for Writ of Certiorari to and including October 20, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3), because a title, right, privilege or immunity claimed under the Constitution or Statutes of the United States, was denied by the District Court of Appeal of Florida, Third District and under Rule 19 (1) (a) of the Rules of the Supreme Court of the United States, adopted June 12, 1967, and effective October 2, 1967, because a State Court decided a federal question of substance in a way probably not in accord with applicable decisions of this Court.

QUESTIONS PRESENTED

I

Whether the Petitioner was denied due process of law when prejudicial evidence which was seized following an arrest not based upon probable cause, without a search warrant and without express consent was admitted over his objection at his trial.

II

Whether the prosecutor's comment that the Defendant failed to explain the possession of certain evidence violated the Petitioner's right to remain silent at his own trial.

III

Whether prejudicial pre-trial publicity prevented a fair trial, essential to due process.

IV

Whether the Petitioner was denied due process when he was required to try his case with other Defendants against whom a mass of testimony and evidence prejudicial to Petitioner was admitted even though such evidence was not admissible as to the Petitioner.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES — AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

CONSTITUTION OF THE UNITED STATES —
AMENDMENT V.

. . . (N)or shall (any person) be compelled in any criminal case to be a witness against himself . . . .

CONSTITUTION OF THE UNITED STATES —
AMENDMENT XIV, SECTION 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 28 UNITED STATES CODE — SECTION 1257(3)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

RULES OF THE SUPREME COURT OF THE UNITED STATES, RULE 19

(1)(a) Where a state court had decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

STATEMENT OF THE CASE

At about 9:00 o'clock P.M. on the evening of February 9, 1965, Dr. Traub heard a knock on the front door of his home. Two men wearing fedora hats and dark glasses gained entrance when he answered the knock by leading him to believe that his wife, who had just left on an errand, had been involved in an automobile accident. After entering, the two men tied and gagged Dr. Traub and his house guest, Mrs. Fritzel. The house was ransacked and the men left with some valuable jewelry and furs belonging to Mrs. Traub and Mrs. Fritzel. At the time the men entered the home, Mrs. Fritzel was talking to a friend over the telephone and gave an alarm when she became aware of their purpose. As a result, two police cars approached the scene just as three men departed in a Falcon automobile. An officer in one of the police cars recognized the driver of the Falcon as the person he later identified as one of the co-defendants, Anthony Antone. He also made a note of the license number of the Falcon at the time. One of the officers in the other police car saw one person in the back seat of the Falcon whom he later identified as the co-defendant Lou Ghelfi.

A search for the Falcon automobile resulted in its discovery in a parking lot at the Apache Motel. A wit-

ness testified that during the early part of the evening, he observed three men get out of a Cadillac in the parking lot of the Apache Motel and leave in a car resembling a Falcon. Sometime later he saw the three men remove some bundles from the trunk of the Falcon and place them into the trunk of the Cadillac and depart from the lot. He made a note of the license number of the Cadillac and furnished it to the police when they arrived at the parking lot.

The officers ascertained that the Cadillac was owned by Anthony Antone and thereupon went to the apartment occupied by Antone at or about 5:30 or 6:00 o'clock A.M. in the morning of February 10, 1965. Upon their arrival at the apartment, the officer, after knocking, entered the apartment because the door, while closed, was not locked. They made a search of the premises and then waited until 11:00 o'clock A.M. in the morning at which time the three defendants, Antone, Ghelfi and Bretti entered the apartment and all three immediately were arrested. The officers had no search warrant to enter the premises nor did they have an arrest warrant.

Ghelfi gave "consent" to search his automobile which was parked outside Antone's apartment and a brown paper bag was discovered on the floorboards containing some of the jewelry stolen from Dr. Traub's home. The officers also searched Ghelfi's home and discovered two pistols.

After obtaining his "permission" to do so, they also searched Antone's automobile which was parked at a gas station several blocks away and found in the trunk a pillow case containing some furs stolen from Dr. Traub's

home. Later in the day the police again searched Antone's car which was parked in a garage, and there discovered two pistols.

After obtaining Bretti's "permission" to search his automobile as well as his apartment for "jewelry, furs and other things stolen in the robbery", the police found no such articles. They took a driver's license issued in the name of Joseph Arnello which was on the top of the refrigerator in his apartment. It was later discovered that this driver's license, which had never been issued to Joseph Arnello, had been missing from the North Dade Auto Tag Agency since February 15, 1964.

After examining the Arnello driver's license for identification a clerk at Merlin-Rent-A-Car Agency identified Bretti as the man who had rented the Falcon automobile from that agency on the afternoon of February 9th. The blue copy of the contract for the rental of the Falcon was found in the glove compartment of that automobile with one of Antone's fingerprints on it.

Fingerprints of Antone and Ghelfi were found on the Falcon automobile and Antone's fingerprints were found on the Cadillac. No fingerprints of Bretti were found anywhere.

Dr. Traub attended a line-up the day after the robbery and identified three men as the ones who looked most like the men that entered his home. One of the persons he so identified was an individual named Alphonso Robles. He later stated that he selected three men because the police told him to pick out three, but he had, in fact, seen only two at the time of the robbery.

Mrs. Fritzel also observed the line-up and identified three other men, none of whom was Petitioner Bretti.

Petitioner Bretti was charged with armed robbery.

On the morning of November 4, 1965, the Miami Herald carried an article which read, in part, as follows:

> "Antone 46, Bretti 31, and Ghelfi 28 are well known locally among police as highly competent burglars."

Based upon the above, a motion for mistrial was made and denied. (TR-386).

Antone testified that he had never been convicted of a crime and Petitioner Bretti also testified that while he had been convicted of one crime, he had never been convicted of burglary. Five out of six jurors admitted that they received the Miami Herald in their homes that particular day.

A verdict of guilty was returned on November 6, 1965. Motion for new trial was made and denied. Assignments of Error (TR-1203-1206) were asserted in the Florida District Court of Appeal, Third District, which affirmed the judgment and ruled against the federal questions presented. A Motion for Rehearing was also denied. A Petition for Writ of Certiorari in the Supreme Court of Florida was denied.

HOW THE FEDERAL QUESTIONS WERE RAISED AND PASSED UPON IN THE STATE COURTS

The federal questions here presented were raised as follows:

1. By a Motion to Suppress the Evidence, filed March 16, 1965 (TR-1148). Denied May 24, 1965 (TR-1153).

2. By a Motion for Severance filed October 19, 1965. (TR-1158). Denied (TR-1185).

3. By a Motion for Mistrial because of pre-trial publicity. (TR-386) Denied.

4. By a Motion for a Mistrial. (TR-1179) Denied.

5. In Assignments of Error in the Criminal Court of Record in and for Dade County, Florida. Assignments 5, 6, 7, 10, 11, 16, 17, and 19. On illegal search and seizure; Assignments 5, 10, 11, 16, and 17. On self-incrimination; Assignments 17. On due-process Assignments 6 and 7.

6. The District Court of Appeal, Third District of Florida, **Bretti v. State,** 192 So. 2d 6 (Fla. App. 1966), stated on page 7: "The arrest without warrant was based on probable cause. The motion to suppress evidence . . . was properly denied. The searches were made with consent. The comment by the prosecutor . . . did not amount to a comment by the prosecutor on failure of defendants to testify in their own behalf. A newspaper article published during the trial . . . was not the basis for mistrial."

7. The Supreme Court of Florida failed to take jurisdiction by denying Certiorari on May 24, 1967.

REASONS FOR GRANTING THE WRIT

I

The Petitioner submits that he was denied due process of law when harmful evidence which was seized following an arrest not based upon probable cause, without a search warrant and without express consent was admitted over his objection at his trial.

This Court has, in recent years, been emphatic in the proposition that the search of a defendant or his home must be in conformity with the Constitutional guarantees of the Fourth Amendment. In **Mapp v. Ohio,** 367 U.S. 643 (1961), it said:

> "We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." (p. 655)

This Court then quoted from the case of **Boyd v. United States,** 116 U.S. 616, (1886) and said, "Constitutional provisions for the security of person and property should be liberally construed . . . ".

In **Ker v. California,** 374 U.S. 23 (1963) this court said that the reasonableness of the search is determined in light of the fundamental criteria laid down by the Fourth Amendment. The determinations of the State Courts as to constitutional rights are not insulated against examination.

In the light of these Constitutional interpretations, the Petitioner submits that the search of his room and the resultant use of the driver's license found therein was illegal and that his conviction based upon the use of this illegal evidence should be overturned.

The Petitioner's room was searched without a warrant. Therefore, to be permissible, it must be incident to a lawful arrest. **Preston v. United States,** 376 U.S. 364 (1964). Whether an arrest was constitutionally valid depends upon whether, at the moment the arrest was made, the officers had probable cause to make it — whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that **the petitioner** had committed or was committing an offense. **Beck v. Ohio,** 379 U.S. 89 (1964). The arresting officers had not one shred of reasonable grounds or probable cause to arrest Petitioner Bretti. When the police received a communication from an informer concerning an automobile owned by Antone, they went to his apartment to arrest only him (TR-538). They would have arrested **anyone** with Antone, testified Captain Morgan (TR-548). It is to be remembered that the defendant was not arrested on the night of the crime but on the next day. It could not be assumed, therefore, that the three men were fleeing from the crime together.

Even if the arrest was lawful, which it was not, the search was still not incident thereto. This court has held that a search is illegal if the premises searched is separate from the place where the arrest was made. **Silverthorne Lumber Co. v. United States,** 251 U.S. 385 (1920); **Agnello v. United States,** 269 U.S. 20 (1925). In the case

at bar, the Petitioner was arrested in Antone's room and taken to his own room which was then searched. Petitioner submits that generally police have been given the right to search a suspect without a warrant in order to seize hidden weapons or contraband which might be destroyed before a search warrant can be obtained. In this case, the police had the defendants in custody in a separate part of the building. They could easily have secured a search warrant without any of the inherent dangers of waiting. Petitioner does not contend that the evidence was "mere" evidence or that it should be suppressed for that reason. Thus, **Warden, Maryland Penitentiary v. Hayden,** 87 S.Ct. 1642 (1967), does not apply.

In the case at bar, the Petitioner's apartment was searched for specific items of the crime, and at the time the license was seized, the searching officer did not know that it related to the crime. (MR-101). The right to search incident to a lawful arrest is not a right to conduct a general exploratory search in the hope that evidence of a crime might be found. Such a search is tantamount to an unlawful invasion of the premises. **Go-Bart Importing Co. v. United States,** 282 U.S. 344 (1931).

The District Court of Appeal, Third District, of Florida held that the Petitioner had given his "permission" to the police to search his apartment. If this were true, then the evidence then seized would have been admissible at his trial.

This Court has not yet established the guidelines for determining the validity and effect of consent by the suspect to a search of his home. However, in other areas where the prosecution has asserted that the defendant has

"waived" a substantial constitutional guarantee, this court has been emphatic in its ruling.

In **Miranda v. Arizona**, 16 L.Ed 2d 692 (1966) where the defendant "waived" his right to remain silent, this court held that "unless adequate protection devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." (p. 714) Surely the right to remain secure in one's home is as important as the right to remain silent.

The lower federal courts and some state courts have cast a questioning eye upon supposedly voluntary searches. In perhaps the landmark case on the subject, **Judd v. United States**, 190 F2d 649, 650-51 (CADC 1951) the court said:

> Searches and seizures made without a proper warrant are generally to be regarded as unreasonable and violative of the Fourth Amendment. True, the obtaining of the warrant may on occasion be waived by the individual; he may give his consent to the search and seizure. **But such a waiver or consent must be proved by clear and positive testimony, and it must be established that there was no duress or coercion, actual or implied.** The Government must show a consent that is "unequivocal and specific" . . . "freely and intelligently given." Thus "invitations" to enter one's house, extended to armed officers of the law who demand entrance, are usually to be considered as invitations secured by force. A like view has been taken where an

officer displays his badge and declares that he has come to make a search . . . even where the householder replies "All right." A finding of consent in such circumstances has been found to be "unfounded in reason". Intimidation and duress are almost necessarily implicit in such situations; if the Government alleges their absence, it has the burden of convincing the court that they are in fact absent.

The burden on the government is particularly heavy in cases where the individual is under arrest. Non resistance to the order or suggestions of the police is not infrequent in such a situation; true consent, free of fear or pressure, is not so readily to be found. (Emphasis added.)

In the case at bar, the Petitioner testified at the hearing to suppress the evidence that he had not given permission to the police to search his apartment: (MR-36)

"Q. Did you give them permission to search the room?
A. No, I didn't."

The Petitioner also testified: (MR-30)

"A. Well, two men came out with shotguns and told us to put our hands up. They told us to come inside the apartment and not to make any moves or we would be dead."

In **Weed v. United States**, 340 F.2d 827 (1965), the court said:

> (A)ppellant's surrender of the Cadillac keys occurred while he was in custody after he had been told upon his inquiry that the arresting officers had no warrant but could get one if necessary, and during a period of dramatic excitement of drawn guns. We have no hesitancy in holding that under these circumstances the alleged consent was not 'freely and intelligently given.'

Jerry Bishop, a police officer, testified: (MR-103)

> "A. (W)e told him that we didn't have a warrant, but we could search it anyway."

In **Barnes v. State**, 25 Wis. 2d 116, 130 NW 2d 264 (1964), the court held that the consent was involuntary because the defendant was under arrest and had been informed by one of the officers that the arrest justified the search. The opinion noted that the government's burden of proving voluntary consent is greater when the defendant is under arrest and when **the defendant knew he would be searched whether he consented or not.**

As this Court pointed out in **Miranda v. Arizona, supra,** a simple warning is not sufficient to waive a Constitutional Right; the waiver must be **knowingly** made by the defendant.

Petitioner submits that under the circumstances of this case, there could never have been a KNOWING

waiver of constitutional rights nor any real consent to the search.

Even if the consent to search had been knowingly granted the driver's license seized was inadmissible evidence against this defendant because the searching police officer testified (MR-100) that the consent was limited to a search for **jewels and furs.** If a warrant had been secured the search would have been limited to the articles described therein. Thus, since consent merely takes the place of a warrant, a consentual search is similarly limited to one for the specific articles described by the officer who acquired the defendant's consent. It would seem totally inconsistent with the Fourth Amendment protections to say that, as a substitute for a valid search warrant, such limited consent could grant wider powers to search than an issued warrant specifically limited in its scope.

It is generally considered that a trial court is the best arbiter of the facts and that its ruling as to whether evidence should be admitted should be sustained. In this case the trial court said:

> "THE COURT: For one reason only, I am going to deny your motion and admit it. This is poor jurisprudence, and I will say it in the record, but, nevertheless, because the State cannot appeal from a Motion to Suppress, I am going to deny your Motion and admit it, and state right here that the Court is, nevertheless, of the opinion that the State is committing reversible error." (TR-603)

Petitioner now submits that the driver's license taken from his motel room was taken in violation of the Fourth and Fourteenth Amendments of the Constitution of the United States and that its use at his trial resulted in prejudice to his cause and for this reason his Petition for Writ of Certiorari should be granted.

II

The Prosecutor's comment that the defendants failed to explain the possession of certain evidence, violated the Petitioner's right to remain silent at his own trial.

In his closing argument to the jury, the prosecutor said:

> "Now we have got the furs; we have got the jewels; we have got the loot, and we have no reasonable explanation at that time to Capt. Morgan, either by Ghelfi or by Antone." (TR-1079)

> The District Court of Appeal in its opinion said: "The comment by the prosecutor . . . did not amount to a comment by the prosecutor on failure of defendants to testify in their own behalf". (Appendix A).

The natural effect of the comment by the prosecution was to bring to the jury's attention that the defendant had not explained his co-defendants' possession of the loot. Even though the prosecutor said "at that time" the stigma of the failure to testify was attached to the

trial. This Court in **Griffin v. California**, 380 U.S. 609, 615 (1965) said:

> We . . . hold that the Fifth Amendment . . . in its bearing on the States by reason of the Fourteenth Amendment, forbids . . . comment by the prosecution on the accused's silence . . . .

In determining what is comment on the defendant's failure to take the stand, the Florida District Court of Appeal has said:

> A comment made by a prosecuting attorney, directly or indirectly, which is subject to interpretation by a jury as a comment upon failure of a defendant to testify has been strictly regarded as impingment on the substantial right of the defendant . . . . **Flaherty v. State**, 183 So. 2d 607, 609 (1966)

The Florida Supreme Court has held that a comment on a defendant's failure to explain possession of recently stolen property is reversible error; so to is a comment upon a co-defendant's failure to testify. **Singleton v. State**, 183 So. 2d 245 (1966). In **Hayes v. United States**, 329 F. 2d 209, 222 (CA 8th Cir. 1964) the court said, "Permitting comment upon the failure of a defendant to testify constitutes prejudicial error as to the non-testifying defendant."

The Petitioner testified in this case; however, this testimony was limited to a denial of the allegations of a local newspaper which impuned a past conviction of burglary to the Petitioner. Petitioner submits that where

a defendant takes the stand in a limited capacity he does not waive the protection of "no-comment". If this were considered a waiver, then he would have to forego one constitutional right in order to exercise another. This would be neither just nor equitable.

Petitioner submits that the comment of the prosecutor had to be interpreted by the jury as a comment on the Defendant's failure to take the stand in his own defense. Therefore, his constitutional right to remain silent

was denied and his Petition for Writ of Certiorari should be granted.

III

Prejudicial pre-trial publicity prevented the Petitioner from having the fair trial essential to due process.

On the morning of the second day of trial, the Miami Herald, the largest metropolitan newspaper in Dade County, printed a story imputing previous conviction records for burglary to the defendants. Although five out of the six jurors in the panel had received that newspaper in their homes that morning, the trial court did not examine the jury separate and apart from each other to ascertain what effect, if any, the newspaper article had upon them, and a motion for mistrial was denied.

In **Shepard v. Maxwell**, 384 U.S. 333 (1966), this Court made an exhaustive review of the current law on the question of pre-trial and trial publicity. In that opinion this Court said:

Among those legal procedures is the require-

> ment that the jury's verdict be based on evidence received in open court, not from outside sources. . . . (W)e set aside a federal conviction where the jurors were exposed "through news accounts" to information that was not admitted at trial. We held that the prejudice from such material may indeed be greater "than when it is part of the prosecution's evidence" for it is then not tempered by protective procedures. At the same time we did not consider dispositive the statement of each juror "that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against the petitioner as a result of the articles." (p. 351)

In the case at bar the question is not whether or not the jury was in fact prejudiced, this would be impossible to determine now that the trial is over. Where there is a possible prejudice in the jury, the trial court should make every effort to determine whether it is there and if so to either wipe it out or grant a mistrial or continuance. In **United States v. Accardo**, 298 F. 2d 133 (1962), the jury had been exposed to information about the defendant's prior record. The court said:

> The judge's general admonitions at the beginning of the jury selection, his assumption of their effectiveness and his instructions were inadequate protection. There is no certainty that all jurors would volunteer information about violating the admonitions or admit that they were influenced by the publicity. He should have, by the careful examination of each juror, out of

> the presence of the other, determined the effect of the articles on those who had read them and whether they had discussed the articles with others. These individual interviews would have tended to overcome reluctance to speak out. (p. 136)

A prior record of the Petitioner, if there was one, would undoubtedly have been very prejudicial on the jury if it had come to their attention. The trial court should have made a more extensive investigation of the jury to see if any were prejudiced by the newspaper article. By the trial court's failure to do so, the Petitioner was denied due process of law and for this reason this Petition for Writ of Certiorari should be granted.

IV

The Petitioner was denied due process when he was required to try his case with other defendants against whom a mass of prejudicial testimony and evidence was admitted even though such evidence was not admissible as to the Petitioner.

During the course of this trial incriminating evidence was admitted showing that two of the defendants were at the scene of the crime and were subsequently in possession of the fruits of the crime. Even though this evidence alone provided the backbone of the State's case, none of it was admissible as to the Petitioner. For this reason a Motion for Severance was made to the trial court.

The nature of the foregoing evidence was such that

it was impossible for the jury to separate evidence admissible against the co-defendants from the evidence which was inadmissible against this defendant.

The totality of the evidence presented in this case was very persuasive and could easily have been the basis for the conviction of the other two defendants. The evidence against the Petitioner, however, was only of the type which could show some slight connection between him and the other two defendants. Yet during the trial, the evidence was presented so that the jury could not help but attach the persuasiveness of the documentary evidence to the guilt of the Petitioner.

In **United States v. Haupt**, 136 F. 2d 661 (1943) and **Schaffer v. United States**, 221 F. 2d 17 (1955), the courts held that where the evidence is such that the jury cannot distinguish its effects against joint defendants, then it is error for the court to deny a severance requested by one of the defendants.

The very nature of the joint trial is such that it denies each defendant due process. Each defendant is denied the possible exculpatory statements that could be gained if he were able to call the other defendants to the stand. Also the very association of one man against whom the case if strong with another man against whom the case is less convincing in a court of law under the auspices of a judge has an inescapable tendency to incriminate the defendant against whom the evidence is less incriminating.

The classic argument in favor of joint trials is that they are convenient and economical. This argument was

correctly rejected in **DeLuna v. United States**, 324 F 2d 375 (CA 5th 1963) when it said:

> The overriding consideration in all criminal cases is measured justice according to the Constitution. The inconvenience of a severance and the possibility of a mistrial if there should be a joint trial of co-defendants do not tip the scales for the Government when an accused's right to silence is in the balance. (p. 376)

It has been argued that the prejudicial effect of the joint trial can be overcome by the court's instruction to the jury to disregard the non-applicable testimony. In **Krulewitch v. United States**, 336 U.S. 440, Mr. Justice Jackson asserted:

> (T)he naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practical lawyers know to be unmitigated fiction.

Petitioner, therefore, submits that by trying his cause with other defendants where a great mass of evidence was admissible to those defendants but not to him, he has been denied due process and for that reason this Petition for Writ of Certiorari should be granted.

CONCLUSION

The Petitioner, Bretti, was arrested merely because he was with a man who happened to be suspected of committing a crime. He was then taken to his apartment where it was searched without a warrant. A driver's li-

cense was taken from his apartment without his consent and was used by the jury to convict him. During argument, the Prosecutor placed an onus of guilt upon the defendant by his reference to the other defendants' failure to explain their possession of the fruits of the crime. The jury was exposed to a newspaper article which indicated that the defendant had a prior record of similar crimes. This evidence was inadmissible at his trial.

These are the salient facts of the case. They do nothing but show that the entire proceedings deprived the Petitioner of basic Constitutional guarantees. Even though each of these facts standing alone would entitle the Petitioner to the granting of the Petition, it is submitted that also under **Getchell v. United States**, 282 F. 2d 681 (1960), the accretion of error was a deprivation of due process.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MILTON E. GRUSMARK
Attorney for Petitioner
407 Lincoln Road
Miami Beach, Florida

By: _____
Milton E. Grusmark

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that a true copy of the foregoing Petition for Writ of Certiorari was mailed to HON. EARL FAIRCLOTH, Attorney General, The Capitol Building, Tallahassee, Florida, this 19th day of October, 1967.

Milton E. Grusmark

APPENDIX

A

DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

Nov. 15, 1966

No. 65-915.

DOMINICK ANGEL BRETTI,

Appellant,

-v-

THE STATE OF FLORIDA,

Appellee.

Rehearing Denied Dec. 5, 1966.

Hoffman & St. Jean, Miami Beach, for appellant.
Earl Faircloth, Atty. Gen., and
Arden M. Siegendorf, Asst. Atty. Gen., for appellee.

Before HENDRY, C.J., and CARROLL and SWANN, JJ.

PER CURIAM.

The appellant Dominick Angel Bretti was one of three men informed against, tried and convicted of the crime of armed robbery. Appellant was sentenced to be confined in the state penitentiary for a period of fifteen years. On consideration of the record and briefs on this appeal taken by him we find that no reversible error has been demonstrated, and we affirm.

[1-6] The arrest without a warrant was based on probable cause. The motion to suppress evidence obtained by the officers in searches following arrest was properly denied. The searches were made with consent. Longo v. State, 157 Fla. 668, 26 So. 2d 818. It was not made to appear that appellant's consent to search was coerced. See Shay v. State, Fla. 1954, 70 So. 2d 363. Appellant contended the consent which he gave to search his car and apartment for the stolen jewels and furs did not operate as a consent to search otherwise, and that the court should have suppressed the evidentiary item represented by another person's driver's license found there. We can not agree. The license was discovered to have been stolen, and to have been used by appellant to rent the automobile employed in the robbery. When found in appellant's apartment, the license was lying in plain view. The appellant disclaimed it, and professed to know nothing about it. Under those circumstances, and because of the contraband nature of the item, its seizure was authorized. Its evidentiary use, as a link in a chain of events connecting appellant with the robbery was only cumulative to other sufficient evidence thereof. The comment by the prosecutor in argument on the failure of defendants to furnish reasonable explanation of possession of recently stolen property when discovered, did not amount to a comment by the prosecutor on failure of defendants to testify in their own behalf at the time of trial. Romanello v. State, Fla. App. 1964, 160 So. 2d 529; Miley v. State, Fla. App. 1966, 186 So.2d 299. A newspaper article published during the trial, claimed by appellant to have been prejudicial was not a basis for mistrial. It was established by the trial judge upon inquiry of the jurors that they had not read the article, and they were admonished not to do so. Moreover, a mistrial motion was not made. No abuse of dis-

cretion was shown in the refusal of the trial judge to grant appellant a severance. Manson v. State, Fla. 1956, 88 So. 2d 272; Jackman v. State, Fla. App. 1962, 140 So. 2d 627.

Affirmed.

B

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1967
THURSDAY, APRIL 27, 1967

CASE NO. 35,966

DISTRICT COURT OF APPEAL, THIRD DISTRICT

DOMINICK ANGEL BRETTI,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

A True Copy
TEST:
SID J. WHITE
Sid J. White
Clerk Supreme Court.
BY: ELLA NIELL WILLIM; Chief Deputy Clerk.
CC: Hon. W. P. Carter
Hon. J. F. McCracken
Hon. Philip Carlton, Jr.
Hon. Arden M. Siegendorf
Hon. Richard E. Gerstein

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM A.D. 1967

WEDNESDAY, MAY 24, A.D. 1967

CASE NO. 35,996

DOMINICK ANGEL BRETTI,

Petitioner

-vs-

STATE OF FLORIDA,

Respondent

On consideration of the Petition for Rehearing filed by Attorney for Petitioner,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

A TRUE COPY,

TEST:

SID J. WHITE
CLERK SUPREME COURT

TOPICAL INDEX TO BRIEF

	Page
INTRODUCTION	1
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
ARGUMENT	
I	7
II	16
III	19
IV	22
CONCLUSION	25

AUTHORITIES CITED

	Page
Abel v. United States, 362 U.S. 217 (1960)	13
Agnello v. United States, 269 U.S. 20 (1925)	15
Barnes v. United States, 341 F. 2d 189 (C.A. 5th 1965)	18
Beck v. Ohio, 379 U.S. 89 (1964)	15
Brady v. United States, 39 F. 2d 312, 313 (C.C.A. 8th 1930)	23
Carroll v. United States, 367 U.S. 132, 158 (1925)	13
Crum v. State, 172 So. 2d 24 (Fla. App. 1965)	10
Elkins v. United States, 364 U.S. 206 (1960)	13
Estes v. Texas, 381 U.S. 532, 542 (1965)	20
Flaherty v. State, 183 So. 2d 607 (Fla. App. 1966)	19
Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931)	8
Gorin v. United States, 313 F. 2d 641, 646 (C.A. 1st 1963)	23
Griffin v. California, 380 U.S. 609 (1965)	17
Harris v. United States, 331 U.S. 145 (1947)	13

AUTHORITIES CITED (cont.)

	Page
Honig v. United States, 208 F. 2d 916 (C.A. 8th 1953)	8
Jackman v. State, 140 So. 2d 627 (Fla. App. 1962)	23
Jackson v. State, 132 So. 2d 596 (Fla. 1961)	9
Jeffers v. United States, 187 F. 2d 498 (C.A.D.C. 1950)	13
Johnson v. New Jersey, 384 U.S. 719 (1966)	13
Ker v. California, 374 U.S. 23 (1963)	8
Landsdown v. United States, 348 F. 2d 405 (C.A. 5th 1965)	10
Manson v. State, 88 So. 2d 272 (Fla. 1956)	23
Marshall v. United States, 360 U.S. 310 (1959)	21
McAbee v. United States, 294 F. 2d 703 (C.A.D.C. 1961)	18
Miranda v. Arizona, 384 U.S. 436 (1966)	18
Myrick v. State, 177 So. 2d 845, 847 (Fla. App. 1965)	9
Nicholson v. United States, 355 F. 2d 80 (C.A. 5th 1966)	18
Opper v. United States, 348 U.S. 84 (1954)	23

AUTHORITIES CITED (cont.)

	Page
Preston v. United States, 376 U.S. 364 (1964)	15
Real v. United States, 326 F. 2d 441 (C.A. 10th 1964)	18
Rideau v. Louisiana, 373 U.S. 723 (1963)	20
Ruhl v. United States, 148 F. 2d 173 (C.C.A. 10th 1945)	8
San Fratello v. State, 154 So. 2d 327 (Fla. App. 1963)	10
Shaffer v. United States, 221 F. 2d 17 (C.A. 5th 1955)	23
Sheppard v. Maxwell, 384 U.S. 333 (1966)	21
Shores v. United States, 174 F. 2d 838, 845 (C.A. 8th 1949)	8
Silverthrone Lumber Co. v. United States, 251 U.S. 385 (1920)	15
Singleton v. State, 183 So. 2d 245, 251, 252 (Fla. App. 1966)	19
Slater v. State, 90 So. 2d 453 (Fla. 1956)	9
Steele v. United States, 267 U.S. 505 (1925)	9
Tatum v. United States, 321 F. 2d 219 (C.A. 9th 1963)	11

AUTHORITIES CITED (cont.)

	Page
United States v. Accardo, 298 F. 2d 133 (C.A. 7th 1962)	22
United States v. Echeles, 352 F. 2d 892 (C.A. 7th 1965)	23
United States v. Haupt, 136 F. 2d 661 (C.A. 7th 1943)	23
United States v. Kahaner, 203 F. Supp. 78 (D.C.N.Y. 1962)	23
United States v. Kahn, 381 F. 2d 824 (C.A. 7th 1967)	23
United States v. Lee, 308 F. 2d 715 (C.A. 4th 1962)	13
United States v. MacLeod, 207 F. 2d 853 (C.A. 7th 1953)	8
United States v. Mitchell, 322 U.S. 65 (1944)	8, 9
United States v. Page, 302 F. 2d 81 (C.A. 9th 1962)	9
United States v. Rabinowitz, 339 U.S. 56, 66 (1950)	11
United States v. Shaffer, 291 F. 2d 689 (C.A. 7th 1961)	21
United States v. Smith, 209 F. Supp. 907, 914 (D.C. Ill. 1962)	23

AUTHORITIES CITED (cont.)

	Page
United States v. United States Gypsum Co. 333 U.S. 364 (1947)	9
Warden v. Hayden, 87 S.CT. 1642 (1967)	14
Wilson v. United States, 162 U.S. 613 (1896)	18
Young v. Slate, 203 So. 2d 650	18

STATUTES

Federal:

Rule 14, 41 (e), Federal Rules of Criminal Procedure, 18 U.S.C.A.	9

Florida:

Section 918.09, Florida Statutes, F.S.A.	18

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO.——

DOMINICK ANGEL BRETTI,

Petitioner,

vs

THE STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of Florida, Third District

---

BRIEF OF RESPONDENT

INTRODUCTION

The petitioner was the defendant in the trial court and the appellant in the District Court of Appeal, Third District of Florida. The respondent was the plaintiff and appellee, respectively, below. The parties will be referred to as they stand before this Court and the symbol "SR" refers to the transcript of the motion to suppress and "R" refers to the trial transcript. All emphasis has been supplied unless the contrary is indicated.

QUESTIONS PRESENTED

Respondent respectfully rephrases the issues presented in the petition for writ of certiorari.

I

Whether petitioner was denied due process of law when the trial court resolved a conflict of fact on a motion to suppress and admitted evidence seized during a search, which, the court determined, had been made pursuant to petitioner's free and voluntary consent?

II

Whether the prosecutor's comment that petitioner had not given a reasonable explanation for possession of recently stolen property, expressly directed to the time when petitioner was found in possession, amounts to an indirect comment on his right to remain silent at trial?

III

Whether the totality of circumstances sub judice reflect that petitioner was denied a fair trial due to prejudicial pre-trial publicity?

IV

Whether the trial court abused its discretion in refusing to sever the trials of three defendants who had participated in a closely interwoven, tri-partite scheme of robbery where no showing was made that "prejudice" did in fact result or that such alleged "prejudice" would

have been eliminated if petitioner had been tried separately?

STATEMENT OF THE CASE

Because respondent takes issue with the petitioner's version of the facts, the following is submitted:

On the evening of February 9, 1965, at approximately 9:00 o'clock P.M., two men wearing fedora hats and dark glasses gained entrance to the home of Dr. and Mrs. Traub. At that time, the Traub's were entertaining a houseguest, Mrs. Janet Fritzel. The two men drew pistols, then tied and gagged Dr. Traub and Mrs. Fritzel. The house was ransacked and the men left with a quantity of jewelry and furs belonging to Mrs. Traub and Mrs. Fritzel. During the course of the robbery, a third man appeared but only his feet were visible to Dr. Traub and Mrs. Fritzel. Both Dr. Traub and Mrs. Fritzel identified one Ghelfi and one Antone as the two men who tied, gagged and robbed them (SR 91-93, R 216-217).

During the course of the robbery, a detective upon routine patrol in the area, received a radio message that there was some trouble at the Traub residence and consequently proceeded in that direction. Detective Brooks testified that he noticed a 1964 Falcon containing three men leaving the scene. He further testified that he was able to identify Ghelfi as one of the occupants and that he wrote down the license number of the Falcon which he checked out over his police radio (SR 105-109).

Officer Vitt testified that at approximately the same time Detective Brooks approached the Traub residence, he

approached the area and noticed a Falcon containing three men leaving the vicinity. His lights shone on the occupants of the car and he "got a good look at the driver." He likewise jotted down the license number and then proceeded towards the house (SR 115). Officer Vitt identified the driver of the vehicle as one Antone (SR 115).

The Falcon in question was discovered at approximately 5:00 o'clock A.M., on the morning of February 10th in the parking lot of the Apache Motel (SR 72). Mr. Joseph Bartz, an occupant of the motel, testified that earlier that evening (approximately 9:00 o'clock P.M.) he observed three men get out of a Cadillac in the parking lot of the Apache Motel and leave in the Falcon. Sometime later that evening he saw three men return, remove a bundle from the trunk of the Falcon and place it into the trunk of the Cadillac. The three men departed in the Cadillac. Bartz wrote down the license number of the Cadillac and furnished it to the police when they arrived at the parking lot (R 413-450).

The police officers ran a check on the license tag of the Cadillac and it was determined that the said vehicle was owned by Antone. Thereupon at or about 5:30 o'clock A.M. on the morning of February 10th, Captain Morgan, Detective Minium, Detective Fowler and several other police officers testified that they knocked on the door of Antone's apartment and received no answer. Captain Morgan knocked again and Detective Minium walked to the window and yelled "police officers". After again receiving no response, Captain Morgan tried the door, walked to the window and yelled "police officers" as did Detective Minium. After again receiving no response,

Captain Morgan tried the door, found it open and entered the apartment followed by the other detectives (SR 69-70, R 480, 486-487). Captain Morgan testified that he went to Antone's apartment for the specific purpose of arresting Mr. Antone (R 486).

The police officers remained in Antone's apartment and at approximately 11:00 o'clock A.M., petitioner and his two co-defendants entered the apartment where they were immediately placed under arrest. Following the arrest, they were searched and found to be unarmed. [Antone's apartment was allegedly searched prior to the arrest. However, no evidence was uncovered and nothing was seized.] Captain Morgan then inquired how they arrived at the apartment and Ghelfi stated that they had used his car and that it was parked downstairs. As Captain Morgan testified: "I went downstairs with Ghelfi to his car, a Cadillac convertible, white in color, and I asked him, I said, 'Have you any objections if I look it over?' And he said 'No.'" (SR 81). Following a search of the car, a brown bag was discovered under the front seat which contained some of the jewelry which had been stolen from Mr. Traub's home. A subsequent search of Ghelfi's home, with his consent, uncovered two pistols and a chest containing a torch and various tools (SR 86-88).

After obtaining his consent, Antone's automobile was likewise searched and a pillow case containing some of the furs stolen from the Traub home was discovered. Later in the day, a subsequent search of the Antone vehicle revealed two pistols (SR 82-86).

Officer Bishop testified that he and Detective Ford

went with petitioner to a service station of the 79th Street Causeway where they searched his car after obtaining his permission (SR 100). Nothing was found. Petitioner then took the officers to his apartment where he consented to a search (SR 100) and as the record reflects:

> "Q [Prosecutor] Did you open the door?
> A [Bishop] He opened the door. He had the key.
>
> Q What happened when you got inside?
> A In regards to what we were looking for, furs and jewels, we found none. However, we found a driver's license on top of the bureau that was of another name. We asked him about this driver's license. He said he knew nothing about it; it wasn't his." (SR 101).

This driver's license which had never been issued to Joseph Anello had been missing from the North Dade Auto Tag Agency since February 15, 1964 (R 626-628).

A clerk at Merlin-Rent-A-Car Agency identified petitioner as the man who had rented the Falcon automobile from the agency on the afternoon of February 9th after presenting the Anello driver's license for identification (R 698).

Based on the foregoing, the jury returned a verdict of guilty on November 6, 1965 (R 1190). Petitioner was sentenced to a term of fifteen years in the State penitentiary (R 1191-1194).

The circumstances surrounding the allegedly prejudicial comment of the prosecutor, pre-trial publicity and severance issues will be discussed in the Argument section, infra.

ARGUMENT

In each of petitioner's four reasons for granting the writ, he seeks to convince this Court that the District Court of Appeal, Third District of Florida, decided a Federal question of substance "in a way probably not in accord with applicable decisions of this Court," and as a consequence, petitioner was allegedly denied a title, right, privilege or immunity claimed under the Constitution or Statutes of the United States.

Respondent's brief in opposition demonstrates that the decision of the district court below was in complete harmony with applicable Federal law. Manifestly, there is no important question of Federal law requiring decision by this Court.

I

APPLICABLE FEDERAL LAW IS CONSISTENT WITH THE FINDING OF THE DISTRICT COURT THAT THE SEARCH AND SEIZURE WAS REASONABLE.

The thrust of petitioner's first argument is that harmful evidence which lead to his conviction was the product of an unreasonable search and seizure, measured

by the standard set in **Ker v. California**, 374 U.S. 23 (1963).

This Court has pointed out that the test of reasonableness cannot be stated in rigid and absolute terms:

> "Each case is to be decided on its own facts and circumstances." **Go-Bart Importing Co. v. United States**, 282 U.S. 344 (1931).

Petitioner's argument develops that harmful evidence was seized following an arrest not based upon probable cause, without a search warrant and without express consent.

Of these contentions only the last, the search by consent, raises a ground upon which the Florida courts and respondent have relied to establish the legality of the seizure.

A. Consent to Search

It is, of course, axiomatic that one may consent to a search without a search warrant. **United States v. MacLeod**, 207 F. 2d 853 (C. A. 7th 1953); **Honig v. United States**, 208 F. 2d 916 (C. A. 8th 1953); **Shores v. United States**, 174 F. 2d 838, 845 (C.A. 8th 1949); **Ruhl v. United States**, 148 F. 2d 173 C.C.A. 10th 1945). Indeed, it has been long established that one can validly consent to a search, even though the consent be given while the defendant is in custody, as in the case sub judice, **United States v. Mitchell**, 322 U.S. 65 (1944).

Whether such consent has been given, freely and

voluntarily is, in the first instance, a question of fact for the trial court under Florida and Federal law. (See Rule 41 (e), Rules of Criminal Procedure, 18 U.S.C.A. "The judge shall receive evidence on any issue of fact necessary to the decision of the motion to suppress"); **United States v. Page,** 302 F. 2d 81 (C.A. 9th 1962); **United States v. Mitchell,** 322 U.S. 65 (1944); **Steele v. United States,** 267 U.S. 505 (1925).

It also is settled in Florida that conflicting evidence concerning consent to search does not require a finding of an illegal search and the absence of consent thereto. **Jackson v. State,** 132 So. 2d 596 (Fla. 1961). Moreover, the trial judge was "authorized to discredit the testimony of the [petitioner] in its entirety", **Slater v. State,** 90 So. 2d 453, (Fla. 1956), and to find that it was not "susceptible of belief". **Myrick v. State,** 177 So. 2d 845, 847 (Fla. App. 1965):

> "Mere conflict of evidence does not preclude a finding that consent was freely and voluntarily given." **Myrick v. State,** supra, at 848. See also, **Yant v. State,** (Fla. App. 1963), 154 So. 2d 908.

In reviewing the trial court's determination regarding consent to search, this Court applies the "clearly erroneous" rule. **United States v. Page,** supra. As elucidated in **United States v. United States Gypsum Co.,** 333 U.S. 364 (1947):

> "A finding is 'clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the defi-

nite and firm conviction that a mistake has been committed."

It is fairly obvious that the evidence of consent, adduced at trial and passed upon by the judge and appellate courts in accord with the federal prescription, can hardly produce "the definite and firm conviction that a mistake has been committed".

Officer Jerry Bishop testified that petitioner consented to a search of his automobile and motel room (SR 99-101). Petitioner denied having given consent to the search of his automobile or his motel room (SR 34-36). [It was during the search of petitioner's room that officers discovered the driver's license used to rent the Falcon in the name of Joseph Anello].

This conflicting testimony was considered by the trial judge at the hearing on the motion to suppress. He had occasion to observe the demeanor of the witnesses face to face; certainly a better position than the appellate court to determine who was and who was not telling the truth. Further, on appeal from a judgment of conviction, the evidence must be considered in the light most favorable to the prosecution. **Landsdown v. United States,** 348 F. 2d 405 (C.A. 5th 1965); See also **Crum v. State,** 172 So. 2d 24 (Fla. App. 1965); **San Fratello v. State,** 154 So. 2d 327 (Fla. App. 1963).

Reasonable inferences from the evidence augment the trial court's finding of consent: Before this Court, petitioner suggests that his consent to search was a result of coercion and intimidation. However, **at trial,** when asked whether he had given the officers permission to

search his room, he replied simply in the negative: "No, I didn't (SR 36). **At trial,** petitioner did not testify that he was coerced into giving permission for the search of his motel room and it now seems highly inconsistent to so argue. [The record reference, SR-30, when guns were used, speaks to an incident **before they arrived at petitioner's room,** about one hour earlier (SR 36). The record does not reflect that force or intimidation were used **when consent was given**].

Moreover, there is no reason why petitioner should not have given his consent. No fruits of the crime were found (SR 101). Petitioner well knew, though the police had probable cause to believe otherwise, that his room did not contain the furs and jewels sought. Under these circumstances, consent to what he thought would be a futile search, was an ingratiating gesture most certain to avert suspicion.

Besides the petitioner's testimony, there is absolutely no testimony or other evidence that his consent to the search was not genuine or was reluctantly given. See **Landsdown v. United States,** supra. Petitioner rests his case on his assertion that he did not freely consent. The trial court did not believe him. There is abundant evidence to support that determination, hence it is not "clearly erroneous." See **Tatum v. United States,** 321 F. 2d 219 (C.A. 9th 1963).

It is no answer to assert, as petitioner has, that the police could have obtained a search warrant, for "[T]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." **United States v. Rabinowitz,** 339 U.S. 56, 66 (1950).

B. Proper Seizure

It is clear that the search was made pursuant to petitioner's consent. The question narrows to whether the item seized was the proper subject of a lawful seizure. One of the officers making the search testified:

> "Q What happened when you got inside?"
> "A In regards to what we were looking for, furs, and jewels, we found none. However, we found a driver's license on top of the bureau that was of another name. We asked him about this driver's license. He said he knew nothing about it; it wasn't his" (SR 101).

Officer John Henry Ford testified that petitioner gave his voluntary consent (R 560-561) to a search of his motel room. Officer Ford's purpose for making the search "was to check for jewels **and things stolen in the robbery that was under investigation**" (R 562). He discovered the driver's license in plain view:

> "**THE WITNESS:** I found a driver's license on top of the refrigerator in the name of Joseph Anello. I asked Mr. Bretti if this was his driver's license. He stated no, it was not.
>
> I asked his girl friend, Tracey, I think, if that was her driver's license, or did she know who it belonged to. She said no.
>
> I asked Dominick Bretti if he knew who the driver's license belonged to, and he said no" (R 575).

It is sedentary principle of Federal law that when officers in the conduct of a lawful search discover "contraband or other things subject to seizure, they need not ignore what they discover, though the things discovered were not the things for which they were searching or for which they were entitled to search." **United States v. Lee**, 308 F. 2d 715 (C.A. 4th 1962); **Abel v. United States**, 362 U.S. 217 (1960).

Objects subject to valid seizure have been enumerated by this Court on many occasions. **Harris v. United States**, 331 U.S. 145 (1947). The instrumentalities and means by which a crime is committed as well as the fruits of a crime, such as stolen property, are traditionally among those valid objects of seizure. **Harris v. United States**, supra; **Carroll v. United States**, 367 U.S. 132, 158 (1925). The rule is upon the basis of preventive justice. **Jeffers v. United States**, 187 F. 2d 498 (C.A. D.C. 1950).

The license seized was in plain view of the officers; open and obvious to the naked eye. Petitioner disclaimed any knowledge of the license (R 575). In considering the validity of this seizure, this Court should not show itself unaware of the practical demands of effective criminal investigation and law enforcement, **Elkins v. United States**, 364 U.S. 206 (1960), nor ignore the fact that a driver's license is potentially a valuable document in an impersonalized society which trusts so deeply in official and quasi-official attestations of identity. In light of its great potential for unlawful use, Officer Ford would have been derelict in his duty under the circumstances if he had failed to take into custody the disclaimed driver's license. It should also be noted that the police were well aware that a rental car had been used and that frequently

forged or stolen driver's licenses are used to conceal the true identity of persons planning a crime.

The opinion of the District Court of Appeal of Florida, Third District, reported at 192 So. 2d 6 (Fla. App. 1966), is wholly consistent with this foregoing statement of law:

> "Under those circumstances, and because of the contraband nature of the item, its seizure was authorized.".

C. Mere Evidence

In **Warden v. Hayden,** 87 S.CT. 1642 (1967), the historical distinction between items of evidential value only and instrumentalities, fruits, or contraband was rejected. The basis of the rejection appears to be recognition by this Court that the principal object of the Fourth Amendment, the protection of privacy, is equally well served when the requirements of the Fourth Amendment are fulfilled, whether the search is for "mere evidence" or for fruits, instrumentalities or contraband.

Though **Warden v. Hayden,** supra, expressly did not enlarge the area of permissible searches, once a **lawful intrusion** upon privacy is made, "mere evidence" may properly be seized. In the present case, the initial intrusion upon privacy was made pursuant to the **consent** of the petitioner. The search was not a general exploration but was specifically directed to fruits of the crime and within the scope of consent. In the course of the lawful search, the disclaimed driver's license was seized properly, if for no reason more than its evidential value.

Again, the opinion of the lower court is wholly consistant with the principles stated above:

> "[I]ts [the license] evidentiary use, as a link in a chain of events connecting appellant with the robbery was only cumulative to other sufficient evidence thereof."

Petitioner cites **Preston v. United States,** 376 U.S. 364 (1964), and **Beck v. Ohio,** 379 U.S. 89 (1964), to support the contention that a permissible search, if made without a warrant must be incident to a lawful arrest. Petitioner overlooks the axiom that one may consent to a search without a search warrant. **United States v. MacLeod,** supra. Nor has respondent argued anywhere in proceedings below that the search was incident to a lawful arrest, thus rendering **Silverthrone Lumber Co. v. United States,** 251 U.S. 385 (1920); and **Agnello v. United States,** 269 U.S. 20 (1925), inapposite to the case at bar.

Petitioner discredits the force of **Warden v. Hayden,** 87 S.CT. 1642 (1967), because the police in the instant case could easily have secured a search warrant without any of the inherent dangers of waiting that were present in **Warden v. Hayden,** supra. This Court has stated, at least once, that "[T]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." **United States v. Rabinowitz,** supra.

Petitioner's remaining authority tends to support the argument that waiver of constitutional rights must be freely, voluntarily and knowingly established. The evidence adduced at trial and reviewed herein, supra, clearly

demonstrates that voluntary consent was given by the petitioner. His own testimony forecloses the issue of coerced consent (SR 34-36).

Respondent summarizes:

(1) There was abundant evidence presented to the trial court that petitioner had given his free, voluntary and knowing consent to a search of his motel room;

(2) The trial court properly resolved the conflict of testimony in determining that petitioner did, in fact, give his voluntary consent;

(3) The search of petitioner's room after a lawful, consensual intrusion produced evidence linking petitioner with the crime charged; and

(4) Such evidence was the subject of a valid seizure whether it be considered in the nature of contraband or merely of evidential value.

ARGUMENT

II

APPLICABLE FEDERAL LAW IS CONSISTENT WITH THE FINDING OF THE DISTRICT COURT THAT THE PROSECUTION DID NOT COMMENT ON PETITIONER'S FAILURE TO TESTIFY IN HIS OWN BEHALF.

The thrust of petitioner's second argument, predicted

upon **Griffin v. California**, 380 U.S. 609 (1965), is that a comment by the prosecutor violated his right to remain silent at trial. The alleged violative comment follows:

> "Now we have got the furs; we have got the jewels; we have got the loot, and we have no reasonable explanation **at that time** to Capt. Morgan, either by **Ghelfi or Antone**" (R 1079), (Emphasis supplied).

The District Court of Appeal, held:

> "The comment by the prosecutor in argument on the failure of defendants to furnish reasonable explanation of possession of recently stolen property when discovered, did not amount to a comment by the prosecutor on failure of defendant's to testify in their own behalf at the time of trial. Romanello v. State, Fla. App. 1964 160 So. 2d 529; Miley v. State, Fla. App. 1966 186 So. 2d 299".

It is of paramount importance for this Court to note that the prosecutor did not refer to the petitioner, Bretti, in the above-quoted remark. His reference was clearly to Antone's and Ghelfi's failure to explain **their** possession of the recently stolen furs and jewels—keeping in mind that said articles were **never found** in Bretti's possession. Thus, Bretti can hardly argue that he was prejudiced when the prosecutor commented on inferences from the evidence relating solely to his co-defendants.

Further, a distinction of critical importance separates a prosecutor's comment made during trial, directed to

the defendant's failure to testify and a comment directed to the defendant's failure to give a reasonable explanation of recently stolen property, at the time he is discovered in possession.

While the former genus of comment infringes upon a sacrosanct right protected further by **Griffin v. California**, supra, the latter sort of comment was, at the time petitioner was tried, an orthodox technique of prosecution. **Nicholson v. United States**, 355 F. 2d 80 (C.A. 5th 1966); **Barnes v. United States**, 341 F. 2d 189 (C.A. 5th 1965); **Real v. United States**, 326 F. 2d 441 (C.A. 10th 1964); **McAbee v. United States**, 294 F. 2d 703 (C.A. D.C. 1961); **Wilson v. United States**, 162 U.S. 613 (1896).

The provisions of **Miranda v. Arizona**, 384 U.S. 436 (1966), are not applicable to petitioner's cause, although they might well apply to present prosecutions. See, **Young v. State**, 203 So.2d 650 (Fla. App. 1967). The judgment and sentence of petitioner was entered on November 6, 1965 (R 1193-1194). See, **Johnson v. New Jersey** 384 U.S. 719 (1966).

Section 918.09, Florida Statutes, F.S.A., and a long line of Florida cases attest eloquently to the zealous manner in which this state has protected defendants from comment by the prosecution on the accused's silence: Section 918.09, supra, provides, **inter alia**:

> ". . . [N]o accused person shall be compelled to give testimony against himself, nor shall any prosecuting attorney be permitted before the jury or court to comment on the failure of the accused to testify in his own behalf . . ."

In a myriad of varied circumstances, Florida courts have undertaken great pain to insure the defendant's right to remain silent. See, **Singleton v. State,** (Fla. App. 1966) 183 So. 2d 245, and case collected at 251, 252. In fact, **Flaherty v. State,** (Fla. App. 1966) 183 So. 2d 607, cited by petitioner, speaks to the protection of this same right, but to nothing further.

For the foregoing reasons, the prosecutor's comment was eminently correct, assuming arguendo, it had application to Bretti's case.

ARGUMENT

III

APPLICABLE FEDERAL LAW IS CONSISTENT WITH THE FINDING OF THE DISTRICT COURT THAT PETITIONER WAS FAIRLY TRIED.

The thrust of petitioner's third argument is that prejudicial pre-trial publicity prevented him from having the fair trial essential to due process.

The alleged prejudicial pre-trial publicity appeared on the morning of the second day of trial, and consisted of a single article in the **Miami Herald** (R 387).

At the outset of the trial, the trial judge strongly admonished the jury ". . . [N]ot to watch any television newscasts, nor read the newspaper insofar as it may make reference to this case . . ." (R 22), and again: ". . . [I]t is imperative that you do not expose yourselves to any

comment in the newspaper, on the radio or on the television, concerning this case" (R 22).

The next day the alleged prejudicial article appeared (R 26). The trial court determined that five out of six jurors in the panel had received the **Miami Herald** that morning but **no juror** had read anything about the case; nor read the article; nor discussed the article or heard it mentioned or discussed (R 31).

Further inquiry revealed that neither had any juror read any story underneath the allegedly prejudicial article, which involved some other alleged crime; nor had any juror read anything on the page where the pictures appeared (R 31). At the conclusion of the jury polling, petitioner made no objection (R 32).

The District Court of Appeal, in its opinion, held:

> "A newspaper article published during the trial, claimed by appellant to have been prejudicial was not a basis for mistrial. It was established by the trial judge upon inquiry of the jurors that they had not read the article, and they were admonished not to do so. Moreover, a mistrial motion was not made."

Surely, the right of a criminal defendant to a fair and impartial trial, free from prejudicial publicity, is an element of due process of law. **Rideau v. Louisiana,** 373 U.S. 723 (1963). However, stated as a general rule, cases involving claims of due process violation require a showing of identifiable prejudice to the accused. See, **Estes v. Texas,** 381 U.S. 532, 542 (1965).

The trial judge has large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial, however; each case must turn on its own special facts. **United States v. Shaffer**, 291 F. 2d 689 (C.A. 7th 1961); **Marshall v. United States**, 360 U.S. 310 (1959).

In **Sheppard v. Maxwell**, 384 U.S. 333 (1966), this Court surveyed the relevancies of pre-trial publicity while deciding that the massive, pervasive and virulent publicity which surrounded the Sheppard trial constituted reversible error. In so doing, this court appraised "the totality of circumstances" in the case (384 U.S. at 352).

The "totality of circumstances," **Sheppard v. Maxwell**, supra, in the case sub judice, does not indicate an abuse of the "large discretion," **Marshall v. United States**, supra, vested in the trial court.

The record reflects emphatic admonishments by the trial court (R 22), a thorough interrogation on voir dire (R 20-32), and the absence of a motion for mistrial (R 32). With each case turning on "its own special facts", it is difficult to conceive of undivulged prejudice present in circumstances where not a single stone was left unturned.

In **Sheppard v. Maxwell**, supra, this Court ordered a new trial for Dr. Samuel Sheppard based in large measure, upon the deluge of publicity which **actually reached the jury.** In the present case, **not one juror** read the article in issue, yet petitioner argues that the trial court had a **duty** to examine the jurors separately to ascertain whether the article [which they had not read] prejudiced

him, citing **United States v. Accardo,** 298 F. 2d 133 (C.A. 7th 1962).

It should also be noted that petitioner neither requested separate polling nor moved for mistrial. These omissions should render **Accardo,** supra, inapplicable to the case at bar. Further, the procedure utilized by the lower court in permitting trial counsel to freely question the jury (R 31) provided petitioner with ample protection under the **Accardo** principles.

The "totality of circumstances" shows clearly that the trial judge did not abuse his large discretion.

ARGUMENT

IV

APPLICABLE FEDERAL LAW IS CONSISTENT WITH THE FINDING OF THE DISTRICT COURT THAT PETITIONER'S MOTION FOR SEVERANCE WAS PROPERLY DENIED.

The thrust of petitioner's fourth argument is that he was denied due process when the trial court refused to grant his motion for severance. The district court, in its opinion, stated succinctly: "No abuse of discretion was shown in the refusal of the trial judge to grant appellant a severance."

With respect to motions for severance, the question is always whether a joint trial infringes a defendant's right to a fundamentally fair trial. **United States v. Kahn,**

381 F. 2d 824 (C.A. 7th 1967). Both in the Federal courts and in Florida, this finding is discretionary with the trial court. Rule 14, Federal Rules of Criminal Procedure, 18 U.S.C.A.; **Opper v. United States,** 348 U.S. 84 (1954); **Shaffer v. United States,** 221 F. 2d 17 (C.A. 5th 1955); **United States v. Haupt,** 136 F. 2d 661 (C.A. 7th 1943); **Manson v. State,** (Fla. 1956) 88 So. 2d 272; **Jackman v. State,** (Fla. App. 1962) 140 So. 2d 627. Similarly, in both court systems, such discretion is subject to correction if abused. **United States v. Echeles,** 352 F. 2d 892 (C.A. 7th 1965); **Manson,** supra; **Jackman,** supra. Clearly federal and state law are in harmony about severance.

What constitutes such an abuse as to deprive the defendant of a fundamentally fair trial necessarily depends upon the facts in each particular case. **Brady v. United States,** 39 F. 2d 312, 313 (C.C.A. 8th 1930). The determination is made by asking whether it is within the jury's capacity, given the complexity of the case, to follow admonitory instructions and to keep separate, collate and appraise the evidence relevant only to each defendant. **United States v. Kahn,** supra; **Gorin v. United States,** 313 F. 2d 641, 646 (C.A. 1st 1963), cert. den., 374 U.S. 829 (1963); **United States v. Smith,** 209 F. Supp. 907, 914 (D.C. Ill. 1962); **United States v. Kahaner,** 203 F. Supp. 78 (D.C. N.Y. 1962).

The greatest difficulty in appraising evidence relavant to each defendant occurs when the **confession** of one defendant implicates the other. Petitioner stresses, **United States v. Haupt,** 136 F. 2d 661 (C.C.A. 7th 1943), and **Shaffer v. United States,** 221 F. 2d 17 (C.A. 5th 1955). The former case involved the trial of co-defendants where seventy-three pages of "highly incriminating" statements

made by one defendant were equally incriminating against other defendants (136 F. 2d at 672). The latter case, **Shaffer**, supra, also involved a trial of co-defendants where the confession of one implicated the other. The court said:

> "Like the Seventh Circuit in the case of United States v. Haupt, 136 F. 2d 661, 672, 'We doubt if it was within the realm of possibility for this jury to limit its consideration of the damaging effect of such statements merely to the defendant against whom they were admitted."

Petitioner has shown extreme examples of the need for severance in wholly unrelated fact patterns. An examination of the record sub judice reveals that petitioner and his co-defendant were united in a tri-partite scheme of robbery. Petitioner was postively identified as the man who rented the Falcon used in the robbery (R 698). The Anello driver's license, which had been used to rent the Falcon, was found in petitioner's motel room (SR 101). After three men were seen transferring certain property from a Falcon to a Cadillac belonging to a co-defendant (SR 71-73), the police arrested petitioner and co-defendants in an apartment which was rented by a co-defendant (SR 74-76). In the car belonging to a co-defendant, in which petitioner had arrived at the apartment, the police uncovered "a large quantity of jewelry" (SR 80-81). Under such circumstances, it would not have been in error to introduce such items of evidence against petitioner, had he been tried separately.

Because the facts of this particular case evidence the interwoven fabric for a tri-partite scheme of robbery,

in the absence of an incriminating statement or confession by one co-defendant which is bound to implicate another, or other such circumstances which might tend to deprive petitioner of a fundamentally fair trial, the denial of a motion for severance was properly within the trial court's ambit of discretion.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

EARL FAIRCLOTH, Attorney General,
State of Florida.

By _____
ARTHUR L. ROTHENBERG,
Asst. Attorney General,
State of Florida.

ARDEN M. SIEGENDORF,
Asst. Attorney General,
State af Florida.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1967

Case No._____

DOMINICK ANGEL BRETTI,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

CERTIFICATE OF MAILING

I HEREBY CERTIFY, that a copy of this Brief of Respondent in Opposition to the Petition for Certiorari to the Supreme Court of the United States was served upon Honorable Milton E. Grusmark, Attorney for Petitioner, 407 Lincoln Road, Miami Beach, Florida, by mailing a copy of same to him by United States Mail, First Class postage prepaid, pursuant to Rule 33 of this Court, this 10th day of February, 1968.

ARTHUR L. ROTHENBERG
Assistant Attorney General